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No. 92-1839

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1992

COLGATE-PALMOLIVE COMPANY,
Petitioner,

v.

FRANCHISE TAX BOARD,
An Agency of the State of California,
Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California In And For The Third Appellate District

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's Brief in Opposition ("Opp.") does not seriously contest the significance of the issues that Colgate-Palmolive Company ("Colgate") has raised in its petition for certiorari. Instead, Respondent claims that "those issues, to the extent that they are raised" (Opp. at 2), fall within the exclusive purview of the *Barclays* case which is currently pending before this Court. According to Respondent, these same issues, when raised by Colgate, do not warrant this Court's consideration because, allegedly, this Court has already addressed those issues in *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983). In addition, Respondent claims that Colgate raises issues that are not ripe for adjudication. As we demonstrate

below, however, there is no merit to Respondent's suggestion that *Container* disposes of the issues raised by Colgate, nor is there merit to the suggestion that Colgate's petition is premature. Moreover, Respondent has failed to explain how the Court can conscientiously decide the issues raised by *Barclays* without addressing the issues raised by Colgate.

I. UNLIKE *CONTAINER*, THIS CASE RAISES THE ISSUE WHETHER WORLDWIDE COMBINED REPORTING IS CONSTITUTIONAL IN THE CONTEXT OF A CLEAR FEDERAL GOVERNMENT STATEMENT OPPOSING THAT METHOD OF TAXATION

Respondent's contention that the issues raised by Colgate in its petition have already been decided by this Court in *Container* is misguided. In equating this case and *Container*, Respondent has ignored the underlying factual premise that formed the basis of the decision in *Container*. In *Container*, this Court found that it did not have before it a clear statement by the federal government regarding the impact of California's method of taxation on federal foreign policy. *Container*, 463 U.S. at 195 n.33. In the absence of such a statement, this Court was limited to holding that it could not, on its own, invalidate California's tax as unconstitutionally interfering with federal foreign policy. *See Itel Containers Int'l Corp. v. Huddleston*, 113 S. Ct. 1095, 1103 (1993). *See also Kraft Gen. Foods, Inc. v. Iowa Dep't of Rev. and Finance*, 112 S. Ct. 2365, 2372 (1992) (Rehnquist, C.J., dissenting). The evidence lacking in *Container* has now been supplied through numerous letters and statements from the federal government expressing opposition to worldwide combined reporting.[1]

[1] Contrary to the assertions of Respondent (Opp. at 5), it is irrelevant that the federal government's opposition to worldwide combined reporting has been supplied in the form of letters and statements. There is no restriction that requires policy to be expressed in a particular form, and many forms of policy expression have been recognized by this Court as equally valid. *See, e.g., Zschernig v. Miller*, 389 U.S. 429, 437 n.7 (1968); *United States v. Pink*, 315 U.S. 203 (1942).

In short, because there was no clear statement of the position of the Executive Branch in *Container*, *Container* decided a different issue from the one presented here. The issue presented in this case is whether, in the context of a clear statement from the Executive Branch that California's method of tax interferes with United States foreign policy, California's taxing method should be invalidated as a violation of the Commerce Clause.[2] This question, which the Court has never considered, is significant and warrants the Court's plenary review.

II. THE DISCRIMINATION ISSUE RAISED BY COLGATE IS RIPE FOR ADJUDICATION

Respondent claims that the issue of discrimination against U.S.-based multinational groups (but not the other issues) raised by Colgate is not ripe because it depends on resolution of the issue raised by *Barclays*, namely, whether the Commerce Clause bars worldwide combined reporting as applied to foreign-based multinational groups. This Court has previously held that "the question of ripeness turns on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Pac. Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) (citing *Abbott Lab. v. Gardner*, 387 U.S. 136, 149 (1967)). Under this test, Respondent's claim that Colgate has prematurely raised the discrimination issue fails.

When an administrative agency has taken every action possible with respect to a claim in litigation, that claim is un-

[2] Contrary to the assertion of Respondent (Opp. at 3 n.1), the Executive Branch has expressed its opposition to worldwide combined reporting in the context of foreign policy concerns. *See, e.g.*, the Secretary of State's and the U.S. Trade Representative's involvement in Secretary Brady's Letter; *see also* foreign policy documents attached to Secretary Brady's Letter.

doubtedly "ripe." *Abbott*, 387 U.S. at 149. Here, there has been full administrative agency consideration and denial of Colgate's claims for refund raising the Commerce Clause issues. No further action by Respondent on these claims is even possible. Moreover, all of the facts and arguments necessary to resolve the issue are in the record in this case. The issue is therefore clearly fit to be adjudicated by this Court. Moreover, if this Court refuses to entertain the discrimination issue until a final decision in *Barclays*, Colgate will never be able to litigate the issue and recover the amounts unconstitutionally paid to the state. A final decision in this case will resolve the claims for refund and the doctrine of *res judicata* will prevent Colgate from reopening this case. Colgate's claims here cannot be saved and litigated later; they will never be any more ripe than they are today. The hardship requirement of the *Abbott* test is therefore also met in this case.

The rationale behind the ripeness doctrine is to "prevent the courts.... from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way...." *Abbott*, 387 U.S. at 148–49. Colgate has felt the effects of the administrative decision in this case in a concrete way since there can be nothing abstract about the denial of claims for refund. Moreover, since Colgate can have no remedy beyond this lawsuit for the taxes presently at issue, refusal to entertain the discrimination issue will cause irreparable injury. The discrimination issue is ripe for review by this Court.

Although incorrectly labeled as a question of ripeness, it appears that Respondent's true contention is that Colgate should not be able to pursue the discrimination issue until a final decision has been issued in *Barclays*. This is incorrect. All of the facts and arguments relevant to deciding the constitutionality of worldwide combined reporting as applied to a foreign-parent multinational are embraced in the briefs and

records of this instant case.[3] The Court therefore could, if it wished, decide in this case that application of worldwide combined reporting to foreign-parent companies violates the Commerce Clause, and, under the principle of equal treatment for all forms of foreign commerce, consider whether its application to Colgate is prohibited. Indeed, this Court has previously found it necessary to consider the constitutional claims of a third party not before the Court in order to decide the rights of the litigants. *See, e.g., Orr v. Orr*, 440 U.S. 268 (1979); *Barrows v. Jackson*, 346 U.S. 249 (1953).

Significantly, Respondent has not attempted to argue that the substantive issue of whether the Commerce Clause requires domestic-based multinationals engaged in foreign commerce to be treated the same as foreign-based multinationals engaged in foreign commerce is not worthy of this Court's review. Clearly the issue is of national and international significance and should be considered by this Court in the context of this case.

III. *ITEL* DOES NOT ENDORSE RESPONDENT'S VIEW THAT CONGRESSIONAL CONSENT TO STATE ACTION UNDER THE COMMERCE CLAUSE CAN BE INFERRED FROM CONGRESSIONAL SILENCE

Relying on Justice Blackmun's solitary dissent in *Itel*, Respondent claims that this Court has adopted the state court's view that Congress's consent to state laws precluding dormant Commerce Clause scrutiny may be found in "congressional silence." Opp. at 4. The suggestion is preposterous. There was no finding of explicit congressional consent to the state tax at issue in *Itel*, and the Court therefore properly engaged in dormant Commerce Clause analysis in the course of adjudicating the levy's validity. *Itel*, 113 S. Ct. at 1103-05. Indeed, *Itel* strongly reinforces Colgate's view that dormant

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[3] Indeed, the record in *Barclays* is part of the record in this case. *See, e.g., Exhibit 13* (specific findings of facts from the decision in *Barclays*).

Commerce Clause analysis may not be applied "in such a way as to *reverse* the policy that the Federal Government has elected to follow." *Id.* at 1105 (quoting *Wardair Canada Inc. v. Florida Dep't of Rev.*, 477 U.S. 1, 12 (1986)) (emphasis in original).[4]

IV. IF COLGATE PREVAILS IN THIS CASE, RELIEF MUST BE GRANTED ON A RETROACTIVE BASIS

Respondent argues that any decision in favor of Colgate in this case should be applied on a prospective only basis. However, the Court should not consider the issue of prospectivity if it grants review because Respondent has failed to raise this issue in a timely fashion. Respondent first raised this issue at oral argument before the California Court of Appeal. Under California law, however, an issue raised for the first time in oral argument is deemed waived. *See, e.g., Kinney v. Vaccari*, 27 Cal. 3d 348, 356 n.6, 612 P.2d 877, 165 Cal. Rptr. 787 (1980); *Chatterjee v. Kizer*, 231 Cal. App. 3d 1348, 1366 n.4, 283 Cal. Rptr. 60 (1991); *Estate of Davis*, 38 Cal. App. 2d 579, 587, 101 P.2d 761 (1940). Respondent is deemed to have waived this issue, therefore, and cannot raise it at this late stage of the proceedings. In addition, Respondent is contractually bound to apply relief in this case on a retroactive basis. On July 13, 1988, Respondent and Colgate entered into a joint stipulation whereby it was agreed that, if it is determined that Respondent may not combine Colgate with its foreign subsidiaries in a single, worldwide unitary group, Colgate is entitled to refunds. *See* Joint Stipulation, *Colgate-Palmolive Co. v. Franchise Tax Bd.*, No. 319715 (Cal. Super. Ct.) at ¶ 71.

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[4] Inexplicably, Respondent also relies on *Itel* in an effort to deprecate the significance of the Executive Branch's statements as evidence of foreign policy towards worldwide combined reporting. Opp. at 12. In fact, *Itel* relied heavily on the Executive Branch's views in holding that the tax at issue did not frustrate federal foreign policy, observing that "[t]o the extent Itel is arguing that taxes like Tennessee's engender foreign policy problems, the United States disagrees." *Itel*, 113 S. Ct. at 1105.

Even assuming that Respondent may properly raise the prospectivity issue at this juncture, however, the Court's decision must be applied retroactively. In *Harper v. Virginia Dep't of Taxation*, 61 U.S.L.W. 4664 (U.S. June 18, 1993) (No. 91-794), the Court plainly indicated that its decisions must be applied on a retroactive basis in all instances. To be sure, the Court, in *Harper*, was able to rest its decision on the narrower ground that any rule of law applied to the parties before the Court must be applied retroactively to other cases open on direct review. Nevertheless, the Court's references in *Harper* to its lack of "'constitutional authority .... to disregard current law'" (*id.* at 4667, quoting *American Trucking Assns. v. Smith*, 496 U.S. 167, 214 (1987) (Stevens, J., dissenting)) and the fundamental rule of "'retrospective operation' that has governed '[j]udicial decisions'" (*id.* at 4666, quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)), as well as its heavy reliance on *Griffith v. Kentucky*, 479 U.S. 314 (1987), requiring retroactive application of its decisions in criminal cases, leave little doubt that retroactive application of its decisions is constitutionally required in all cases.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: July 30, 1993

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